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17 September 2009

Ms. Debbie YAU  
Clerk to Bills Committee  
Legislative Council Secretariat  
Legislative Council Building  
8 Jackson Road  
Central, Hong Kong

By Fax Only (No. 2869 6794)  
(Total 7 pages)

Dear Ms. YAU,

**Bunker Oil Pollution (Liability and Compensation) Bill**

The Hon. CHEUNG Hok-ming raised in his letter dated 7 September 2009 some comments on the Bunker Oil Pollution (Liability and Compensation) Bill (the Bill). Those comments relating to policy and the interpretation of the Bill<sup>1</sup> were discussed at the Bills Committee meeting on 9 September 2009. Set out below is our written reply to the said letter.

**Place**

**Paragraph 2 Clause 2(1) of the Bill**

2. "Place" can include a state. A state, as opposed to a place within a state, enjoys sovereignty over its territorial sea. Therefore, "territorial sea of a place" can be construed as "territorial sea of a state". This clause follows closely the wording used in Article 2(a) of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunker Oil Convention).

<sup>1</sup> Including the questions on "place" in paragraph 2, "application of ordinance" in paragraphs 3 to 7, the definition of "incident" in paragraph 8, "exemptions from liability" in paragraph 11 and "director may grant exemptions" in paragraph 20.

## **Application of Ordinance**

### Paragraphs 3 to 4 Clauses 2(1) and 3(1) of the Bill

3. The Bill seeks to provide for the liability and compensation arrangements in cases of bunker oil (including heavy oil and light oil) pollution caused by all ships other than oil tankers. The compulsory insurance requirement is however not applicable to ships having a gross tonnage of less than 1 000 or ships navigating exclusively within the river trade limits.

### Paragraph 5 Clauses 2(7)(a)(ii) and (b)(ii), 3(1), 3(4) and 25(2) of the Bill

4. The Bill makes references to both the Hong Kong Special Administrative Region Government (HKSARG) and the government of a state/place. For clarification, we agree to amend all references to the HKSARG in the Chinese text of the Bill to read “特區政府” by way of introducing Committee Stage Amendments to clauses 3(1) and 25(2).

5. We have already stated clearly that the Chinese term “政府” refers to the government of a place including the HKSAR where such is the case, for example, in clauses 2(7)(a)(ii) and (b)(ii) of the Bill.

### Paragraphs 6 to 7 Clause 3(4) of the Bill

6. Clause 3(4) of the Bill provides that “[n]either the Government, nor any public officer in the officer’s capacity as such, is liable to be prosecuted for an offence against this Ordinance.” This arrangement is in line with Government’s legal policy that criminal liability is not imposed on the Government and public officers in respect of regulatory provisions. The inclusion of an express provision to that effect is also consistent with the approach adopted in the drafting of other bills in recent years.

7. Clause 3(4) of the Bill is not applicable if a public officer is not in the course of carrying out public duties and is acting in his personal capacity. The officer may then be held liable under the Bill in respect of his act. Clause 3(4) of the Bill only concerns whether criminal prosecution can be instituted and pursuant to that provision, the HKSARG will not be held criminally liable.

## **Liability of shipowners of ships for pollution damage**

### Paragraph 8 Clauses 2(1) and 5(1) of the Bill

8. Clause 2(1) of the Bill provides for the definition of “incident” —  
““incident” (事故) means any occurrence, or any series of occurrences having the same origin, that —

- (a) causes any discharge or escape of bunker oil from a ship; or
- (b) causes any relevant threat of contamination to occur”.

Paragraph 9 Clause 5(1) of the Bill

9. The Bill covers bunker oil (including heavy oil and light oil) pollution caused by all ships other than oil tankers.

Paragraph 10 Clause 5(3) of the Bill

10. The Bunker Oil Convention is silent on the interpretation of the term “impairment of the environment” referred to in clause 5(3) of the Bill. The term should thus be given its ordinary meaning. Pollution of the marine environment would be an example of “impairment of the environment”.

**Exemptions from liability under section 5**

Paragraph 11 Clause 7 of the Bill

11. The shipowner of a ship is not liable under clause 5 of the Bill in respect of damage resulting from an incident of bunker oil pollution if he proves that the incident has met any of the criteria set out in clause 7 of the Bill. Taking into account considerations of public interest and environmental protection, generally speaking, it is envisaged that the HKSARG will conduct cleaning-up operations and then follow the relevant legal procedures to recover the costs from the shipowner of the ship (if the criteria for exemption under clause 7 of the Bill has not been met) or persons other than the shipowner of the ship who may have caused the incident.

Paragraph 12 Clause 7(a) of the Bill

12. The term “hostilities” when used in a legislation should relate to warfare, armed conflicts and hostile acts by persons acting as agents of sovereign powers or of organised forces or rebels as opposed to mobs or rioters and did not include the act of an individual acting on his own responsibility. “Terrorist act” as defined in section 2(1) of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) does not necessarily fall within “hostilities” but would depend on the facts and circumstances of a particular case. Upon review, there may be a slight difference in meaning for the terms “hostility” and “hostilities”. Since Article 3(3) of the Bunker Oil Convention uses the word “hostilities”, for the English text of the Bill, we propose to amend “hostility” in Clause 7(a) to “hostilities”.

## **Liability of persons other than shipowners of ships**

### Paragraph 13 Clause 9(1) of the Bill

13. As no definition is given to each of the terms “intent”, “knowing” and “recklessly” in the Bill, the ordinary dictionary meaning should apply.

## **Rights of third parties against insurers**

### Paragraph 14 Clause 10(1) of the Bill

14. According to clause 10(1) of the Bill, if it is alleged that as a result of an incident the shipowner of a ship has incurred a liability, and while the incident occurred, there was in force a relevant contract of insurance or other security, legal proceedings may be brought against the person who provided the insurance or other security (an “insurer”). Even if the ship or the shipowner concerned cannot be located, the claimant may still bring legal proceedings against the insurer direct to seek compensation under clause 10(1) of the Bill.

## **Application of Part 3**

### Paragraph 15 Clauses 2(1), 5(1) and 12(1) of the Bill

15. The Bill seeks to provide for the liability and compensation arrangements in cases of bunker oil (including heavy oil and light oil) pollution caused by all ships other than oil tankers. The compulsory insurance requirement is however not applicable to ships having a gross tonnage of less than 1 000 or ships navigating exclusively within the river trade limits.

## **Compulsory insurance against liability for pollution damage**

### Paragraph 16 Clause 13(1) of the Bill

16. In general, a valid certificate issued in compliance with the Bunker Oil Convention should be submitted for clearance before a ship enters the waters of Hong Kong. While the ship remains within the waters of Hong Kong, law enforcement officers may board the ship to check the validity of the certificate.

17. The insurance industry follows strict code of practice. Moreover, the issuing authority only recognizes policies issued by authorized insurance companies. These authorized insurance companies are mostly members of the International Group of Protection and Indemnity Clubs which is the largest association of protection and indemnity clubs. The possibility of an authorized insurance company going bankrupt is extremely remote.

**Power of Director or authorized persons to issue insurance certificates etc.**

Paragraph 17 Clause 16(5) of the Bill

18. Bunker oil insurance is a strict liability indemnity. Basically an insurer is liable to indemnify an insured person if an incident of bunker oil pollution took place and met the criteria set out in the provisions of the Convention. The possibility of a certificate issued in compliance with the Bunker Oil Convention being rendered invalid by reason of breach of contract on the part of the insured person is extremely remote.

**Cancellation and delivery up of insurance certificates issued by Director or authorized persons**

Paragraph 18 Clauses 17(1), 17(4) and 17(5) of the Bill

19. Clause 17(4) of the Bill requires that if a certificate issued under section 16 is cancelled under section 17, the person to whom the certificate is issued must as soon as reasonably practicable deliver up the certificate to the issuing authority. A person who, without reasonable excuse, contravenes section 17(4) commits an offence and is liable on conviction to a fine at level 2.

**Enforcement of foreign judgments**

Paragraph 19 Clause 21(4) of the Bill

20. Clause 21(4) reflects the common law position.

**Director may grant exemptions**

Paragraph 20 Clause 23(1) of the Bill

21. At present, ships of party states of the Bunker Oil Convention, or ships entering or leaving the ports of such states are required to carry on board a valid insurance certificate. The provision empowers the Director of Marine to consider granting exemptions to ships which do not carry a valid certificate issued in compliance with the Bunker Oil Convention but have to enter Hong Kong waters due to special circumstances, such as after an accident.

**Power of Director to authorize certain persons as authorized persons**

Paragraph 21 Clause 25(1) of the Bill

22. Other than issuing the insurance certificates through the Marine Department, the Director or Marine will authorize certain internationally recognized classification societies to issue the insurance certificates under the Bunker Oil Convention. These classification societies are members of the International Association of Classification Societies. They comply with IMO's requirements on authorization and have offices at ports all over the world which enable them to better cater for the operational needs of ships. Such authorization is in line with the Marine Department's existing practice whereby approved organizations are authorized to carry out ship surveys and functions in relation to ship safety, environmental protection and ship and port facility security.

**Powers of enforcement officers**

Paragraph 22 Clause 27(1)(d) of the Bill

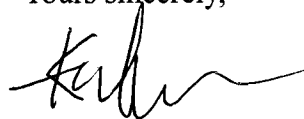
23. Clause 27(1)(d) of the Bill allows law enforcement officers to make or take any copy of relevant documents. Taking pictures of a document is one of the means of copying the document.

**Provision of false information etc.**

Paragraph 23 Clause 28(1) of the Bill

24. "Material" information or document refers to information or document that is important, indispensable and relevant. Whether or not certain information or document is important, indispensable and relevant depends on the circumstances of the case concerned.

Yours sincerely,



(Miss Sian LI)

for Secretary for Transport and Housing

c.c.

DoJ (Attn : Ms. Frances HUI)  
(Attn : Miss Shirley WONG)  
(Attn : Ms. Angie LI)  
(Attn : Miss Karen LEE)

MD (Attn.: Mr. Jimmy LEUNG)